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TWO CHEERS FOR FREEDOM OF CONTRACT

*Mark L. Movsesian**

THE FALL AND RISE OF FREEDOM OF CONTRACT
(F.H. Buckley ed., 1999) (Duke University Press, 461 pp.)

Once, they say, freedom of contract reigned in American law. Parties could make agreements on a wide variety of subjects and choose the terms they wished.¹ Courts would refrain from questioning the substance of bargains and would ensure only that parties had observed the proper formalities.² In interpretation, objectivity was paramount.³ Courts would seek to ascertain, not what the parties had intended, but what a reasonable observer would understand the parties' words to mean.⁴ Contract law was a series of abstractions informed by individual autonomy and judicial deference.⁵

This world, a classical paradise of doctrines with sharp corners, began to disappear in the mid-twentieth century, a victim of legal realism and its successors in the academy.⁶ Legislatures

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¹ See, e.g., W. DAVID SLAWSON, *BINDING PROMISES* 12-16 (1996) (describing United States Supreme Court jurisprudence at the turn of the twentieth century).

² See GRANT GILMORE, *THE DEATH OF CONTRACT* 15 (1974); Friedrich Kessler, *Introduction: Contract as a Principle of Order* to FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY M. KRONMAN, *CONTRACTS* 7-8 (3d ed. 1986), reprinted in *A CONTRACTS ANTHOLOGY* 32, 34-35 (Peter Linzer ed., 2d ed. 1995).

³ See, e.g., Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1756-57 (2000).

⁴ See *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 Fed. 287, 293 (S.D.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913); see also SLAWSON, *supra* note 1, at 20-21; Eisenberg, *supra* note 3, at 1756-57.

⁵ On the abstract nature of classical contract law, see, for example, GILMORE, *supra* note 2, at 13, and Eisenberg, *supra* note 3, at 1749.

⁶ See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1193-94, 1198 (1998) (discussing classical contract law and the

limited the scope of contract by enacting social welfare and consumer protection statutes.⁷ Courts began to police the fairness of agreements, developing new doctrines like unconscionability that allowed them to intervene to protect parties with unequal bargaining power.⁸ When it came to interpretation, courts discounted the apparent certainty of contract language and focused on what the parties had actually meant.⁹ Contract law became more egalitarian and more subjective.¹⁰

But we live in a new day. Twenty-five years after Grant Gilmore famously declared it “dead,” freedom of contract is experiencing a revival in American law.¹¹ The bargain principle has proven remarkably durable, now extending beyond traditional contracts to govern institutions, like marriage, that once were grounded in status.¹² Courts again refrain from challenging the substance of parties’ agreements, and interpretation again emphasizes the written language.¹³ These developments reflect a new formalism that promises (or threatens) to restore the libertarian virtues of contract’s classical past.¹⁴

criticisms of legal realists); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1132-33 (1995).

⁷ See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263, 265 (1999); see also SLAWSON, *supra* note 1, at 43, 90.

⁸ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); see also SLAWSON, *supra* note 1, at 140-44 (discussing unconscionability doctrine); James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1820 (2000) (noting how twentieth-century judges have expanded the doctrine of unconscionability).

⁹ See, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643-44 (Cal. 1968); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1964).

¹⁰ See Eisenberg, *supra* note 3, at 1757-58; Mooney, *supra* note 6, at 1132, 1160.

¹¹ GILMORE, *supra* note 2, at 3. Gilmore occasionally exaggerated for effect and expected his readers to appreciate his irony, see Peter Linzer, *Law’s Unity—An Essay for the Master Contortionist*, 90 NW. U. L. REV. 183, 183-84 & n.2 (1995); see also Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 90 (1995) (arguing that Gilmore’s subject was not contract law so much as the psychology of law generally), something that scholars sometimes have failed to do. See Robert A. Hillman, *The Triumph of Gilmore’s The Death of Contract*, 90 NW. U. L. REV. 32, 32 (1995) (discussing critics’ condemnation of book). In any event, *The Death of Contract* has remained a remarkably influential work. See, e.g., Symposium, *Reconsidering Grant Gilmore’s The Death of Contract*, 90 NW. U. L. REV. 1 (1995).

¹² See Kessler, *supra* note 2, at 17, reprinted in A CONTRACTS ANTHOLOGY, *supra* note 2, at 38; see also Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211 (1995) (stating that bargain principle is basic element of contract law). On the influence of contract principles in contemporary marriage law, see *infra* text accompanying notes 81, 150-54.

¹³ Mooney, *supra* note 6, at 1170, 1189.

¹⁴ On the new formalism in contract law, see, for example, David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842-43 (1999); Mooney, *supra* note 6, at 1133-35; see also Randy E. Barnett, *The Richness of Contract Theory*, 97 MICH. L. REV. 1413, 1414-15 (1999) (book review).

This is the conventional account of American contract law. Like most such accounts, it gets many things right and some things quite wrong.¹⁵ A recent collection of essays, *The Fall and Rise of Freedom of Contract*,¹⁶ explores the accuracies and flaws in the conventional story and reflects on the continuing vitality of freedom of contract.¹⁷ Many of the essays, contributed by some of today's most prominent scholars, come from a law-and-economics perspective, but the book is not unreflective or triumphalist.¹⁸ Taken together, the essays offer useful insights into the capacity of the bargain principle to withstand the critiques of the last century and the principle's adaptability in areas as diverse as tort law,¹⁹ zoning law,²⁰ family law,²¹ bankruptcy law,²² and conflict of laws.²³

One cannot do justice to all these topics in a short essay. Instead, I will concentrate on two areas, marriage and conflict of laws, and discuss the ways in which freedom of contract can make useful contributions to both.²⁴ In addition, I will address an overarching question that *Fall and Rise* provokes. Is it really correct to speak of freedom of contract's contemporary "revival"?²⁵ To do so implies both that freedom of contract had gone into eclipse and that its present victory over rival concepts is more or less complete. Neither proposition is true.²⁶ Today as always freedom of contract coexists with other, competing principles that stress substantive fairness and overriding social values.²⁷ It seems fruitless to argue long about which of these many principles expresses the essence of contract law.²⁸ The better

¹⁵ For example, contemporary contract interpretation is less formal and more subjective than the conventional account suggests. See *infra* text accompanying notes 57-61.

¹⁶ THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999) [hereinafter FALL AND RISE].

¹⁷ See, e.g., F.H. Buckley, *Introduction* to FALL AND RISE, *supra* note 16, at 23.

¹⁸ On the law-and-economics orientation of most of the essays, see *id.* at 2.

¹⁹ FALL AND RISE, *supra* note 16, at 119-56.

²⁰ *Id.* at 157-200.

²¹ *Id.* at 201-79.

²² *Id.* at 281-324.

²³ *Id.* at 325-86.

²⁴ See *infra* text accompanying notes 81-122 (discussing marriage), 123-41 (discussing conflict of laws).

²⁵ Buckley, *supra* note 17, at 2.

²⁶ See, e.g., Pettit, *supra* note 7, at 300-52 (demonstrating that even in the nineteenth century courts recognized public policies that tempered freedom of contract).

²⁷ See ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW 1-3, 7, 267 (1997); Kessler, *supra* note 2, at 2, 17, reprinted in A CONTRACTS ANTHOLOGY, *supra* note 2, at 32, 38; Pettit, *supra* note 7, at 352. For further discussion of this point, see *infra* text accompanying notes 143-56.

²⁸ See HILLMAN, *supra* note 27, at 268; see also Dennis M. Patterson, *The Philosophical Origins of Modern Contract Doctrine: An Open Letter to Professor James Gordley*, 1991 Wis. L. REV. 1432, 1436. For a contrary view on the usefulness of grand

part of wisdom, as Morris Cohen suggested many years ago, lies in accepting the complexity.²⁹

* * *

Part I of *Fall and Rise* addresses the first of the book's two central themes. After decades of judicial and scholastic scorn, freedom of contract remains a fundamental principle of American contract law. What explains this remarkable success? In an interesting essay, Richard Epstein provides an answer: realist critiques of the bargain principle were never as radical as they seemed.³⁰ By and large, the disputes between realists and classicists concerned marginal issues that did not threaten the centrality of freedom of contract.³¹ For example, the much-touted doctrine of promissory estoppel, which allowed parties who had detrimentally relied on promises to recover even in the absence of bargain, did not "compromise the enforcement of fully executory" agreements in the commercial setting.³² The bargain requirement still obtained with respect to "sales, leases, mortgages, partnerships, hire, and countless other collaborative arrangements[.]"³³ The realists had merely added a new "route[] to promissory liability."³⁴

Similarly, the debate over social welfare legislation was exaggerated. Realists and classicists disagreed about which circumstances called for regulation, but they agreed that public policy concerns could override freedom of contract in appropriate cases.³⁵ Laissez-faire courts believed, for example, that common carriers and public utilities could not enjoy the same freedom of contract as providers that lacked monopoly power.³⁶ Even with regard to interpretation, the differences between realists and classicists were relatively minor.³⁷ Classical contract law endorsed a "traditional mix between subjective and objective" approaches;³⁸

theories in contract law, see Barnett, *supra* note 14, at 1419-21.

²⁹ Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 591 (1933).

³⁰ Richard A. Epstein, *Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire*, in *FALL AND RISE*, *supra* note 16, at 25, 26.

³¹ *See id.*

³² *Id.* at 45-46.

³³ *Id.* at 46.

³⁴ *Id.* Epstein makes similar points with respect to the moral obligation doctrine, another realist inroad on consideration. *See id.* at 45-46.

³⁵ *See id.* at 58-60. For an example of a classicist critique of freedom of contract, see Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 374, 379 (1921).

³⁶ *See* Epstein, *supra* note 30, at 60.

³⁷ *See id.* at 35-38.

³⁸ *Id.* at 37.

in any event, as the market itself typically acts to minimize the potential for errors in communication, disputes about interpretive methods have only “limited institutional significance.”³⁹

Many of Epstein’s arguments ring true, and other contributors to *Fall and Rise* elaborate on them. For example, Gregory Alexander explores the willingness of laissez-faire courts to uphold legislative limitations on freedom of contract in the law of insurance and common carriers.⁴⁰ Even in the labor context, laissez-faire courts endorsed regulations that they believed necessary to protect vulnerable employees like sailors, women, and children.⁴¹ Cases like *Lochner v. New York*,⁴² which famously struck down the regulation of working conditions in bakeries,⁴³ reflect only part of classical contract law: courts also recognized communitarian principles that justified restraints on the free market.⁴⁴

Similarly, Michael Trebilcock agrees with Epstein that the debates between classicists and realists concerned only marginal doctrinal issues. Indeed, in Trebilcock’s view, the disputes “amount to little more than clubhouse squabbles among teammates.”⁴⁵ Trebilcock does fault Epstein for not addressing the larger conflict between freedom of contract and social regulation that informs all of contract law.⁴⁶ Trebilcock himself reviews

³⁹ *Id.* As an example, Epstein cites *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864), the famous “Peerless” dispute. The case concerned the sale of cotton, to be transported from Bombay to Liverpool on the ship “Peerless.” *Id.* Although there were two ships by that name that sailed from Bombay to Liverpool at different times, the parties’ agreement did not specify which Peerless would transport the cotton. The buyer refused to pay for the cotton on the ground that it had arrived on the wrong ship, and the seller brought suit for breach. *Id.* at 375. The court ruled for the buyer, apparently accepting counsel’s argument that “there was no consensus ad idem, and therefore no binding contract.” *Id.* at 376.

Scholars have long debated whether the case reflects an objective or subjective approach. See Epstein, *supra* note 30, at 37 & n.59. Epstein explains, however, that cotton traders eventually developed a futures market in which contracts were keyed to the cargo’s anticipated arrival date, thus eliminating the problem that had occurred in the “Peerless” case. See *id.* at 37-38; see also A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 313 (1989) (discussing this development). For further discussion of the “Peerless” case, see, for example, E. ALLAN FARNSWORTH, *CONTRACTS* § 7.9, at 459, 463-64 (3d ed. 1999), and Eisenberg, *supra* note 3, at 1759.

⁴⁰ See Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, in *FALL AND RISE*, *supra* note 16, at 103, 108.

⁴¹ See *id.* at 113-18.

⁴² 198 U.S. 45 (1905).

⁴³ *Id.* at 53.

⁴⁴ See Alexander, *supra* note 40, at 105, 118.

⁴⁵ Michael J. Trebilcock, *External Critiques of Laissez-Faire Contract Values*, in *FALL AND RISE*, *supra* note 16, at 78-79.

⁴⁶ *Id.* at 79.

several aspects of this conflict—information failures,⁴⁷ externalities,⁴⁸ “commodification,”⁴⁹ and paternalism⁵⁰—and shows that the debate between private ordering and public control does not admit of a general solution. What is required, he writes, is “debating and contesting issues both normatively and empirically, category by category and case by case.”⁵¹

Epstein’s argument about interpretation, however, is not so persuasive. Classical contract interpretation was not so freewheeling as Epstein suggests; the *Restatement of Contracts* adopted a rigorously objective approach, a fact that Epstein notes in an aside.⁵² Indeed, objectivity played an essential role in preserving the judicial neutrality that classicism prized.⁵³ Just as a court should not question the substance of a bargain, classicists believed, a court should not rewrite an agreement to make it better reflect the parties’ intent.⁵⁴ In the long run, judicial intervention would create incentives for carelessness and poor drafting that would undercut the predictability of transactions.⁵⁵

Classical interpretation thus scorned subjective understandings: the apparent meaning of the parties’ language would control even when one could demonstrate that the parties had shared a contrary intent.⁵⁶ The “traditional mix between subjective and objective” approaches that Epstein describes is largely a realist innovation.⁵⁷ The realists endorsed party autonomy and believed that courts should honor agreements.⁵⁸

⁴⁷ *Id.* at 82-86.

⁴⁸ *Id.* at 86-88.

⁴⁹ *Id.* at 88-90.

⁵⁰ *Id.* at 90-92.

⁵¹ *Id.* at 93.

⁵² Epstein, *supra* note 30, at 36 & n.52. For discussions of the objectivity of classical contract interpretation, see Eisenberg, *supra* note 3, at 1756-57, and Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 200-02 (1998). For examples of the Restatement’s approach, see RESTATEMENT OF CONTRACTS §§ 71, 230 (1932).

⁵³ See, e.g., Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1234 (1999) (discussing how classical contract interpretation sought to eliminate judicial discretion).

⁵⁴ See II SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 610, at 1176 n.31 (1920); see also Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 546-47 (1996) (discussing Williston’s approach to interpretation).

⁵⁵ See Mark L. Movsesian, *Are Statutes Really “Legislative Bargains”? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1161 (1998) (discussing this argument).

⁵⁶ See II WILLISTON, *supra* note 54, § 610, at 1176-77, § 611, at 1179-80; see also Eisenberg, *supra* note 3, at 1757.

⁵⁷ Epstein, *supra* note 30, at 37.

⁵⁸ See Eric A. Posner, *The Decline of Formality in Contract Law*, in FALL AND RISE, *supra* note 16, at 61, 71-72 (discussing Cardozo and Corbin).

They were not as concerned as classicists about the problem of judicial overreaching, however, and believed that courts could uncover subjective intent without damaging the security of transactions.⁵⁹ Accordingly, they argued, if one could show that the parties had shared an intent at odds with their written agreement, the subjective intent should prevail.⁶⁰ As Epstein correctly notes, contemporary contract interpretation has adopted this approach.⁶¹

In his contribution to Part I of *Fall and Rise*, Eric Posner recognizes that subjectivity plays a larger role in interpretation than it did during the classical period.⁶² Indeed, he points out, contract law generally is less formal today than it was 100 years ago.⁶³ Although the bargain principle has persisted, it cannot explain many contemporary doctrines.⁶⁴ Posner points out that “an odd system of parallel tracks now prevails. Courts apply seriatim the doctrine of duress and the preexisting duty rule to disputes over contract modifications; . . . the consideration doctrine and promissory estoppel to disputes over firm offers and gratuitous promises; and so on.”⁶⁵

What caused this decline of formalism in contract law? Posner persuasively argues that the change was not the result of any antipathy to the market.⁶⁶ Realists like Llewellyn believed that their reforms would bolster the market; the UCC’s “solicitude for established business practices amounted to a paean to freedom of contract.”⁶⁷ Posner admits that the shift from formalism might be explained by courts’ increased confidence in their ability to determine parties’ intentions and to police bargains for coercion and fraud.⁶⁸ He ultimately rejects that explanation, however, in favor of one that focuses on judges’ interest in their reputations.⁶⁹

⁵⁹ See Movsesian, *supra* note 55, at 1165-66.

⁶⁰ See Corbin, *supra* note 9, at 164 (arguing that the goal of interpretation “is the ascertainment of the intention of the parties (*their* meaning), and not the meaning that the written words convey . . . to any third persons”); Ross & Tranen, *supra* note 52, at 202-04 (discussing Corbin’s views).

⁶¹ Epstein, *supra* note 30, at 36; see also RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981). On the subjectivity of contemporary contract interpretation, see Eisenberg, *supra* note 3, at 1758, 1759-60, and Movsesian, *supra* note 55, at 1162-67.

⁶² See Posner, *supra* note 58, at 65, 71.

⁶³ See *id.* at 65-66.

⁶⁴ See *id.* at 65.

⁶⁵ *Id.*

⁶⁶ See *id.* at 63, 69, 77.

⁶⁷ *Id.* at 70.

⁶⁸ See *id.* at 70-71. Posner refers to this explanation as a decline of the “deference thesis,” and he links it to the same confidence in governmental institutions that gave rise to the administrative state. *Id.* at 66, 70, 77-78.

⁶⁹ See *id.* at 72-78.

Judges develop good reputations by deciding cases—or at least appearing to do so—on the basis of precedent rather than the judges' personal beliefs.⁷⁰ Precedent may weaken over time, however, and judges can subtly recharacterize doctrine in a manner that allows them to advance their personal beliefs without sacrificing their reputations.⁷¹ American contract law has followed this pattern, as judges have gradually nudged the law away from classical formalism.⁷²

Of course, this account leaves open an important question. Why did twentieth-century American judges want to move contract law to greater informality? Posner dismisses as simplistic the idea that judges were responding unreflectively to larger political and economic trends.⁷³ Judges might sense broader social movements, he writes, but only as “distant echo[es].”⁷⁴ The better explanation is that the shift to informality was a more-or-less random event, a result of the chance occurrence that realist-leaning judges were on the bench at a certain moment in history.⁷⁵ “On this theory,” Posner states, “the decline of formality, like the rise of formality before it, was just a long-term accident, and may be reversed in the future.”⁷⁶

Posner is correct that a description of doctrinal change should take into account judges' interest in their reputations.⁷⁷ But his depiction of the shift to informality as an essentially random event is unpersuasive. Judges can increase their prestige, not simply by appearing to follow precedent, but by deciding cases according to theories that elites in the legal profession favor. If they reach “good” results in high-profile cases, judges can receive praise in bar committees, scholarly journals, and even the editorial pages.⁷⁸

⁷⁰ See *id.* at 73-74.

⁷¹ See *id.* at 75-76.

⁷² See *id.* at 76-78.

⁷³ See *id.* at 76.

⁷⁴ *Id.*

⁷⁵ See *id.*

⁷⁶ *Id.* at 78.

⁷⁷ For discussions of the influence of reputation on judicial behavior, see, for example, RICHARD A. POSNER, *OVERCOMING LAW* 117-18, 119 (1995), and Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 627-31 (2000).

⁷⁸ See Schauer, *supra* note 77, at 628-30 (discussing hypothesis that decisions of the Supreme Court are influenced by Justices' wishes to increase their reputations with the “mainstream elite press” and “elite law professors”). Schauer notes that law clerks are in a position to apprise the Justices “of the current attitudes of young intellectuals, of law professors, and of the intellectual classes in general.” *Id.* at 628. For a good description of how constitutional law has tracked twentieth-century intellectual trends, see John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 WM. & MARY L. REV. 177, 196-207 (1999).

If their opinions seem outside the “mainstream,” by contrast, judges can draw harsh criticism—in extreme cases, criticism that limits the chance of appointment to higher positions on the bench.⁷⁹ In short, if one focuses on reputation, it is not at all simplistic to maintain that judges’ decisions will generally reflect broader intellectual trends in the profession—in the context of twentieth century contract law, trends in favor of the public regulation of agreements. The conclusion follows directly from Posner’s theory.

A contemporary intellectual trend in favor of market ordering may provide the basis for the second of *Fall and Rise*’s central themes: the extension of contract principles to other areas of law. Parts II through VI of *Fall and Rise* cover several such areas.⁸⁰ One of the most interesting is marriage. Contract principles play a much greater role in marriage law than they did a generation ago, a development that has led critics to worry about the commercialization of the institution.⁸¹ In an interesting essay, Elizabeth and Robert Scott argue that the critics have focused on the wrong sort of contract.⁸² The true model for marriage, they believe, is not the one-shot transaction, but the so-called “relational” contract.⁸³ In a relational contract, the parties enter into a long-term arrangement—a franchise or supply agreement, for example—that necessarily leaves some terms open for future delineation.⁸⁴ Over time, the parties’ behavior creates

⁷⁹ See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 187-88 (2000); Boris I. Bitker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL’Y 9, 51-52 (1995); cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 612 (1993) (noting that “the confirmation process for federal judges seems designed to ensure that judges are in the mainstream of popular views”).

⁸⁰ See FALL AND RISE, *supra* note 16, at 119-56 (tort law), 157-200 (zoning law), 201-79 (family law), 281-324 (bankruptcy law), 325-86 (conflict of laws).

⁸¹ See, e.g., Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 2, 25-28; Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 608-09, 627-28, 641-42, 657, 681-84; see also Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 777-79 (discussing criticisms). For more on the role of contract principles in contemporary marriage law, see Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1560 (1994).

⁸² See Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in FALL AND RISE, *supra* note 16, at 201, 202.

⁸³ See *id.* at 202, 209-10, 236. The Scotts had addressed this theme in an earlier piece. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

⁸⁴ See Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 828-29 (2000). The academic literature on relational contract is substantial, see, for example, Symposium, *Relational Contract Theory: Unanswered Questions*, 94 NW. U. L. REV. 737 (2000), though the concept has had a limited impact on

understandings—“relational norms”—that, together with wider trade customs—“social norms”—fill in the gaps.⁸⁵ Unlike a one-shot transaction, a relational contract is characterized by reciprocity and interdependence.⁸⁶ Each party understands the need to compromise and cooperate to further the collective good.⁸⁷

The Scotts write that “marriage fits *this* model of contract quite well, indeed.”⁸⁸ Spouses make a long-term commitment to one another, memorializing their agreement by the familiar vows of fidelity.⁸⁹ Over time, the spouses’ daily interactions create expectations that impart meaning to these vague terms; social conventions about the way married people should behave towards one another reinforce the spouses’ reciprocal commitment.⁹⁰ Although they are not subject to judicial enforcement—the Scotts explain that courts lack the capacity to evaluate “the complex web of behaviors known to and observable by the parties alone”⁹¹—these expectations and conventions provide the key ingredients that hold the marital bargain together.⁹² The legal system comes into play only to address “massive defections” from the norms that result in termination of the agreement: divorce.⁹³

The Scotts recognize that, compared to other relational contracts, contemporary marriages seem “peculiarly prone to fail.”⁹⁴ They believe that the law’s failure to enforce “mandatory commitment periods” has contributed greatly to marriage’s decline.⁹⁵ The Scotts argue that minimum duration terms—for example, clauses that provide a two- or three-year waiting period for divorce—can make marriages more stable by forestalling disputes and encouraging cooperation between the parties.⁹⁶ In most states, however, courts will not enforce such terms: “[u]nder

courts and in mainstream contract theory. See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 737, 744 (2000); Speidel, *supra*, at 824. For a trenchant criticism of the relational contract model, see Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000).

⁸⁵ See Scott & Scott, *supra* note 82, at 210; see also Feinman, *supra* note 84, at 742 (discussing contract norms).

⁸⁶ See Scott & Scott, *supra* note 82, at 210.

⁸⁷ See Speidel, *supra* note 84, at 829.

⁸⁸ Scott & Scott, *supra* note 82, at 210.

⁸⁹ *Id.*

⁹⁰ See *id.* at 228-32.

⁹¹ *Id.* at 232. In his contribution to this part of *Fall and Rise*, Trebilcock agrees with this assessment. Michael J. Trebilcock, *Marriage as a Signal*, in *FALL AND RISE*, *supra* note 16, at 245, 245.

⁹² Scott & Scott, *supra* note 82, at 210.

⁹³ *Id.* at 202; see also *id.* at 234-35.

⁹⁴ *Id.* at 244.

⁹⁵ *Id.* at 216; see also *id.* at 203, 242-43, 244.

⁹⁶ See *id.* at 215-18, 225-27. The Scotts also argue for a maximum duration term, after which the parties could divorce without a waiting period. See *id.* at 217, 225.

the unilateral no-fault rule, all marriages are functionally terminable at will.”⁹⁷ This judicial refusal not only deprives parties of a useful tool; it also contributes to the weakening of social norms that reinforce marriage.⁹⁸ The social sanctions for divorce today are “relatively modest,” the Scotts write, in part because of the ease with which parties can legally exit the marital relationship.⁹⁹ Thus, while public policy may mitigate against “extremely inflexible” terms,¹⁰⁰ such as those that flatly prohibit divorce, courts should not nullify terms that merely make divorce more difficult.¹⁰¹

Many of these points are persuasive. For example, the Scotts are right that marriage shares some characteristics of contract—marriage begins with an exchange of promises, after all—and that marriage resembles the relational model more than it does the standard one-shot transaction.¹⁰² The Scotts are right too that the courts should avoid entangling themselves in the everyday interactions of married couples; how could a court accurately judge whether one spouse had breached the duty to do a fair share of the household work?¹⁰³ Finally, the Scotts are right that refusing to enforce promises *never* to divorce is consistent with contract theory. As I demonstrate in more detail below, contract law declines to enforce many sorts of promises on public policy grounds.¹⁰⁴ Given the anguish that a bad marriage can cause, and the potential for physical and psychological abuse, enforcing pledges never to divorce would impose an unacceptable social

⁹⁷ *Id.* at 241. The famous Louisiana “covenant marriage” statute, see LA. REV. STAT. ANN. §§ 9:272-9:275.1 (West 2000), which allows parties to limit the right to divorce by imposing a two-year waiting period, is a notable exception. See Scott & Scott, *supra* note 82, at 201; see also James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 882 (2000); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1902 n.1 (2000).

⁹⁸ See Scott & Scott, *supra* note 82, at 243.

⁹⁹ *Id.* at 237, 243.

¹⁰⁰ *Id.* at 242.

¹⁰¹ See *id.* at 217.

¹⁰² See, e.g., Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 871 (1994) (noting that “marriage has many of the characteristics of relational contracting”); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, “I Gave Him the Best Years of My Life”*, 16 J. LEGAL STUD. 267, 271-72 (1987) (discussing ways in which marriage can be understood as a peculiar kind of contract). For an early, seminal discussion, see Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 720-21, 725 (1974).

¹⁰³ See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. REV. 65, 130-32 (1998) (discussing the difficulty of devising workable judicial standards for evaluating non-monetary promises in a marriage contract); see also Trebilcock, *supra* note 91, at 245 (agreeing with Scotts that “the law has a minimal role to play in directly enforcing intramarital commitments”).

¹⁰⁴ See *infra* text accompanying notes 143-49.

cost.¹⁰⁵

Nonetheless, one can make too much of the analogy between marriages and relational contracts.¹⁰⁶ Despite the growing influence of contract ideas, marriages have not been privatized to the extent the Scotts suggest.¹⁰⁷ As I explain below, courts subject marriages to much more rigorous procedural and substantive review than commercial contracts.¹⁰⁸ More fundamentally, demonstrating that marriages are like relational contracts does not solve the puzzle that the Scotts themselves identify: why are contemporary marriages so much more likely to fail? The Scotts argue that the courts' refusal to enforce mandatory commitment periods is largely to blame, but a simpler explanation comes to mind. Marriages fail so much more often than commercial arrangements because marriages are so much more difficult. Cohabitation and family responsibilities create emotional and physical demands that are much greater than the sort one typically finds in commercial settings.¹⁰⁹ Moreover, behavioral studies suggest that there are centrifugal forces at the heart of marriage. Men, whose marital prospects tend to increase as they become wealthier and more established, have strong temptations to desert their families to pursue new relationships with younger women.¹¹⁰

Of course, these factors have always existed. The key reason for the instability of contemporary marriage, as the Scotts themselves suggest, is the rapid disappearance of the social norms that traditionally have supported the institution.¹¹¹ The

¹⁰⁵ See Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1449 (1998). Interestingly, recent studies show that the divorce of their parents heightens the risk of sexual abuse for girls. See Robin Fretwell Wilson, *Children At Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 282 (2001).

¹⁰⁶ For interesting discussions of how the reciprocal obligations of marriage differ from contract terms, see Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1373-75 (2001); Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1980-84, 1987 (2000).

¹⁰⁷ See Scott & Scott, *supra* note 82, at 203-04 (discussing "pervasive" trend toward private ordering in marriage law).

¹⁰⁸ See Eric A. Posner, *Family Law and Social Norms*, in FALL AND RISE, *supra* note 16, at 256, 270; Regan, *supra* note 81, at 638; Silbaugh, *supra* note 103, at 74. For further discussion, see *infra* text accompanying notes 150-154.

¹⁰⁹ Cf. Regan, *supra* note 81, at 645-49 (arguing that relational contract discourse does not capture the "distinct kinds of obligations" that characterize marriage). For discussions of the ways in which the reciprocal obligations of marriage differ from contract terms, see Ellman, *supra* note 106, at 1373-75; Nock, *supra* note 106, at 1980-84, 1987.

¹¹⁰ See Cohen, *supra* note 102, at 284-87 (discussing studies).

¹¹¹ See Scott & Scott, *supra* note 82, at 212-13, 237-38. On the rapidity of the changes in Americans' attitudes toward marriage, see Posner, *supra* note 108, at 273, and Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 356 (1997). For an argument that cultural changes that disfavor marriage can be traced back to the libertarian impulse of the Enlightenment, see James Q. Wilson, *Why We Don't Marry*, CITY J. 46, 51 (Winter 2002).

individualistic values of our society militate against binding marital commitments.¹¹² As the Scotts explain, “[i]n contemporary society, couples can live together in intimate relationships without social sanction.”¹¹³ Divorce carries little, if any, stigma; even having and raising children out of wedlock is increasingly accepted.¹¹⁴ Given Americans’ growing indifference to the values it represents, it should come as no surprise that marriage as a legal institution has gone into decline.

As I have explained, the Scotts contend that allowing couples to provide for mandatory commitment periods would help revive social norms that favor marriage.¹¹⁵ This is an intriguing argument, one that Elizabeth Scott has developed further in a subsequent paper.¹¹⁶ One can envision something like the following dynamic. Mandatory commitment periods would give married couples greater incentives to cooperate and avoid unnecessary disputes; they would also allow married couples time to “cool off” and resist transitory impulses to divorce.¹¹⁷ As a result, marriages with mandatory commitment periods would be significantly more stable than marriages without them.¹¹⁸ Couples considering marriage would come to appreciate this benefit and increasingly choose the mandatory commitment option. Over time, stable marriages would again become the norm, and divorce again an aberration.

One might be tempted to dismiss this scenario as overly optimistic. America’s individualistic values have led to lenient divorce laws, not the other way around;¹¹⁹ if those values remain

¹¹² See Scott & Scott, *supra* note 82, at 237-38; see also Patrick McKinley Brennan, *Of Marriage and Monks, Community and Dialogue*, 48 EMORY L.J. 689, 714-15 (1999) (book review); Hafen, *supra* note 81, at 2; Wilson, *supra* note 111, at 51, 53-54. The Scotts correctly point out that “[w]ithin some close-knit religious, ethnic, and geographical communities, social norms continue to function effectively to promote marital stability.” Scott & Scott, *supra* note 82, at 237.

¹¹³ Scott & Scott, *supra* note 82, at 212.

¹¹⁴ On the disappearance of any stigma attached to divorce, see Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 549-50, 668 (1998). On the increasing social acceptance of raising children out of wedlock, see Lloyd R. Cohen, *Rhetoric, the Unnatural Family, and Women’s Work*, 81 VA. L. REV. 2275, 2278 (1995), and Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 UTAH L. REV. 587, 596.

¹¹⁵ See Scott & Scott, *supra* note 82, at 242-43.

¹¹⁶ Scott, *supra* note 97.

¹¹⁷ See Scott & Scott, *supra* note 82, at 242-43; see also *id.* at 215-18, 225-27.

¹¹⁸ See Scott, *supra* note 97, at 1953-54.

¹¹⁹ See Trebilcock, *supra* note 91, at 255; Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT’L REV. L. & ECON. 325, 334 (1998); see also Wilson, *supra* note 111, at 50-51, 53-54.

the same, legal reform may have only limited impact.¹²⁰ Still, making divorce more difficult might have *some* positive effect on marriage norms, and the Scotts' proposal is worth a try.¹²¹ To be sure, a two- or three-year waiting period for divorce would cause hardship for some married couples, but, given society's interest in greater marital stability, it would be a hardship that society could fairly ask them to bear.¹²² Moreover, as the parties themselves had voluntarily agreed to it, enforcement of a waiting period would not violate their autonomy. In a paradoxical way, as the Scotts suggest, allowing parties greater freedom of contract might help restore a more communitarian version of marriage.

Another area in which contract principles have come to play a greater role is conflict of laws.¹²³ Traditional conflict principles disfavored contractual choice of law clauses.¹²⁴ Courts generally resolved multistate contract disputes under a territorial approach, applying the law of the jurisdiction where the contract was made, or, in some cases, the law of the jurisdiction where performance took place.¹²⁵ To allow parties to select the law that would govern their agreement seemed an affront to sovereignty. If parties could select their own law, they would become a sort of private legislature, a result traditional scholars found "absolutely anomalous."¹²⁶

With the increased importance of international commerce, the traditional resistance to choice of law clauses has gradually weakened, and today such clauses are presumptively

¹²⁰ Cf. Trebilcock, *supra* note 91, at 255 (noting lawyers' temptation "to exaggerate the importance of law (or marginal changes in it) in shaping basic patterns of human conduct"). The relationship between law and social norms has drawn much recent scholarly attention. See Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1781 & n.2 (2000) (discussing scholarship); see generally Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1603 (2000). For an interesting recent discussion of the complexity of the relationship, see Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603 (2000).

¹²¹ For discussions of the ways in which law can influence social norms, see, for example, Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1538-39, 1544 (2000); Cass R. Sunstein, *On the Expressive Value of Law*, 144 U. PA. L. REV. 2021, 2026 (1996) (same).

¹²² In cases of abuse, the law could provide for restraining orders or for earlier termination of the marriage. See Scott, *supra* note 97, at 1962 & n.166.

¹²³ See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 962 (1994) (explaining that "[a]cceptance of party autonomy as a principle for resolving choice of law problems is one of the major successes of modern conflicts theory").

¹²⁴ See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 653 (3d ed. 1996).

¹²⁵ See *id.* at 664-65; see also RESTATEMENT OF CONFLICT OF LAWS §§ 332, 358 (1934).

¹²⁶ JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* § 332.2, at 1079-80 (1935); see also Sterk, *supra* note 123, at 965 (discussing Beale's objections).

enforceable.¹²⁷ In multi-jurisdictional transactions, choice of law clauses promote certainty and predictability, “mak[ing] it possible for [the parties] to foretell with accuracy” what their rights and duties will be.¹²⁸ Accordingly, contemporary courts honor the parties’ selection unless, in the words of the *Restatement (Second) of Conflict of Laws*, the parties have unreasonably chosen the law of a state that lacks a “substantial relationship to the parties or the transaction” or a law that is “contrary to a fundamental policy of a state which has a materially greater interest . . . in the determination of the particular issue.”¹²⁹

Several contributors to *Fall and Rise* applaud this greater openness to choice of law clauses.¹³⁰ For example, in the context of the United States federal system, Bruce Kobayashi and Larry Ribstein argue that allowing parties to choose their own law encourages the enactment of efficient regulations.¹³¹ Their argument follows from the insights of public choice theory. Because of interest group pressures, they write, a particular state may enact an inefficient regulation that imposes a

¹²⁷ See BORN, *supra* note 124, at 654; see also Sterk, *supra* note 123, at 962-63 (discussing “[a]cceptance of party autonomy as a principle for resolving choice of law problems”); cf. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 332 (discussing Supreme Court’s “impulse . . . to encourage international trade by enforcing dispute resolution provisions in international commercial contracts”); Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 195-96 (1997) (arguing that choice of law clauses are essential for the conduct of international trade).

¹²⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971); see also Erin Ann O’Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1560, 1569 (2000) (discussing how choice of law clauses promote certainty and predictability).

¹²⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2). The description in the text applies where the issue is “one which the parties could not have resolved by an explicit provision in their agreement.” *Id.* Where the issue is one that the parties could have resolved by explicit provision, their choice of law will be honored without exception on an incorporation-by-reference rationale. See *id.* § 187(1) & cmt. c.

The Restatement’s formulation has received wide acceptance. See BORN, *supra* note 124, at 654, 655; Sterk, *supra* note 123, at 964. For a discussion of the sort of policies that qualify as “fundamental” for these purposes, see *infra* text accompanying notes 155-57.

¹³⁰ See, e.g., Bruce H. Kobayashi & Larry E. Ribstein, *Contract and Jurisdictional Freedom*, in FALL AND RISE, *supra* note 16, at 325; Geoffrey P. Miller, *Choice of Law as a Precommitment Device*, in FALL AND RISE, *supra* note 16, at 357, 369; Robert K. Rasmussen, *Free Contracting in Bankruptcy at Home and Abroad*, in FALL AND RISE, *supra* note 16, at 311, 321-24; Roberta Romano, *Corporate Law as the Paradigm for Contractual Choice of Law*, in FALL AND RISE, *supra* note 16, at 370, 386.

¹³¹ Kobayashi & Ribstein, *supra* note 130, at 325-27. Ribstein has addressed this idea further in a recent article written with Erin O’Hara. See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1154 (2000).

disproportionate burden on certain firms.¹³² Although these firms have an incentive to move to other states that have more efficient laws, the cost of exit likely will be high.¹³³ Choice of law clauses decrease the cost of exit, however, allowing the firms to escape the inefficient regulation without actually transferring operations.¹³⁴ Ultimately, the interest group pressures that led to the inefficient regulation will subside: because target firms can easily avoid bad regulations, there is little incentive for interest groups to push for their adoption.¹³⁵

Indeed, as Kobayashi and Ribstein suggest, jurisdictional competition for outside investment can lead to the adoption of lenient choice of law rules.¹³⁶ States seeking to attract foreign investment can make themselves more appealing by allowing firms to opt out of local law.¹³⁷ As Geoffrey Miller points out in his insightful essay, this may be a particularly useful strategy for developing countries in the international context.¹³⁸ Such

¹³² Kobayashi & Ribstein, *supra* note 130, at 326. For more on how interest groups can secure the adoption of inefficient regulations, see John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 523-24 (2000).

¹³³ See O'Hara & Ribstein, *supra* note 131, at 1162.

¹³⁴ Kobayashi & Ribstein, *supra* note 130, at 325. Kobayashi & Ribstein concede that enforcing choice of law clauses might also allow firms to escape good regulations, but believe that market discipline restrains such behavior. "Although a state might try to become a haven for miscreants," they write, "contracts that chose the state's law would be priced accordingly." *Id.* at 346.

¹³⁵ See *id.* at 327, 331. *But see* O'Hara, *supra* note 128, at 1556-57 (arguing that "[a]lthough contractual opt outs appear to eviscerate interest group transfers, sometimes an opt out actually guarantees a transfer by making it politically palatable").

¹³⁶ See Kobayashi & Ribstein, *supra* note 130, at 331-32; *see also* O'Hara & Ribstein, *supra* note 131, at 1228. At some points, Kobayashi and Ribstein suggest that choice of law clauses themselves promote jurisdictional competition. *See* Kobayashi & Ribstein, *supra* note 130, at 325, 327. This seems unpersuasive. Jurisdictional competition occurs when states have incentives to attract firms. *See* Romano, *supra* note 130, at 372. A state that lures firms away from competing jurisdictions receives benefits in the form of increased capital investment, revenue, and jobs. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1215 (1992); *see also* Romano, *supra* note 130, at 372. If the firms stay where they are and merely choose the state's law, the state gains none of these advantages, and the incentives for it to adopt efficient regulations are absent. Choice of law clauses thus do not themselves promote jurisdictional competition; jurisdictional competition promotes the enforcement of choice of law clauses.

¹³⁷ Some scholars argue that jurisdictional competition will cause a "race to the bottom" that results in inefficient regulation. For descriptions of this argument, see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 275 (1997), and Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1560 (1999). For refutations of this view, see McGinnis & Movsesian, *supra* note 132, at 559-61, and Revesz, *supra* note 136, at 1233-44.

¹³⁸ Miller, *supra* note 130, at 366, 368. Miller argues that choice of law clauses generally can be understood as precommitment devices that prevent local parties and governments from sandbagging foreign investors. *See id.* at 364-66.

countries, which typically require outside investment to help improve living standards, often lack legal systems that foreign investors trust.¹³⁹ Investors may well fear the risk of “opportunistic action” by local governments, “up to and including the risk of complete expropriation of the entire value of the investment.”¹⁴⁰ As a result, developing countries may be able to attract necessary capital only by permitting foreign investors “to bring their own regulatory laws with them.”¹⁴¹

* * *

The conventional account of American contract law traces the course of freedom of contract from triumph to decline to ultimate restoration.¹⁴² In some respects, this account is correct. Freedom of contract has gone in and out of fashion over time, and today it stands as a fundamental tenet of our jurisprudence. Still, to speak of freedom of contract’s “fall” and “rise” is misleading. The changes have not been nearly so dramatic; neither the victories nor the defeats have been as complete as the conventional account suggests.

We have seen how the conventional account exaggerates freedom of contract’s decline in the mid-twentieth century. As the contributors to *Fall and Rise* explain, freedom of contract was never absolute, even during the classical period, and the realists

¹³⁹ See *id.* at 366; cf. Phillip J. McConaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT’L L. 595, 603, 641-43 (2001) (discussing incapacity of legal institutions in developing countries). On the role of international trade and investment in promoting development, see McGinnis & Movsesian, *supra* note 132, at 521-22, 554 & n.244. See also Dan Ben-David, *Trade, Growth and Disparity Among Nations*, in SPECIAL STUDIES 5: TRADE, INCOME DISPARITY AND POVERTY 11, 37-39 (World Trade Org. ed., 1999), available at http://www.wto.org/english/news_e/presoo_e/pov2_e.pdf (suggesting that international trade contributes to upward income convergence among nations); Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT’L L.J. 1, 1 (1998) (“Developing nations increasingly view private international investment as a critical source of development capital, and governments around the world are actively pursuing it.”).

¹⁴⁰ Miller, *supra* note 130, at 366.

¹⁴¹ *Id.* at 368. Of course, foreign investors might not trust the developing country to enforce a choice of law clause that selects foreign law, but Miller discusses ways that the country can give the investors “additional assurances.” *Id.* at 367. For example, the country might agree to submit disputes under a contract to binding arbitration by an international organization, such as the International Center for the Settlement of Investment Disputes. *Id.* at 367-68. Alternatively, the country might join international investment treaties providing for host-country guarantees for loss from breach of contract. *Id.* at 368. As Miller points out, a developing country would find it “extremely costly . . . to abrogate [such] agreements.” *Id.*

¹⁴² See *supra* text accompanying notes 1-14 (reviewing conventional account).

never succeeded in wholly supplanting the principle.¹⁴³ The conventional account also exaggerates the extent of freedom of contract's contemporary revival. While parties today enjoy wide latitude in forming agreements, many contract terms remain unenforceable because they violate judicial policies that stress substantive fairness and overriding social values.¹⁴⁴ I could give several examples, but a few will suffice.¹⁴⁵ Courts refuse to enforce certain "exculpatory clauses" that limit parties' tort liability, particularly when the clauses have a negative impact on members of a protected class like employees or residential tenants.¹⁴⁶ Courts refuse to enforce contract provisions that restrict the alienation of property,¹⁴⁷ as well as those that unreasonably restrain trade, such as broad non-competition clauses.¹⁴⁸ Finally, judges generally decline to enforce terms that curtail fiduciary duties or abridge parties' access to the courts.¹⁴⁹

Even in contexts where freedom of contract has expanded, one should not overestimate the extent of parties' ability to set their own terms. Consider marriage, for example. Contract principles govern the marriage relationship to a much greater degree today than they did a generation ago.¹⁵⁰ But contemporary courts do not treat marriages like other contracts.¹⁵¹ As Katharine

¹⁴³ On the limited scope of freedom of contract during the classical period, see Alexander, *supra* note 40, at 103, 108, and Epstein, *supra* note 30, at 58-60. See also Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 59 (1995); Pettit, *supra* note 7, at 300-52. On the limited nature of realists' attacks on freedom of contract, see Epstein, *supra* note 30, at 25, 26, Posner, *supra* note 58, at 61, and Trebilcock, *supra* note 45, at 78-79.

¹⁴⁴ See FARNSWORTH, *supra* note 39, § 5.2, at 326-28; G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 440-46 (1993); see also Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1740 (1997) (discussing public policy doctrine). Courts typically sever unenforceable terms and honor the remainder of a contract. See Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 46-56 (1995).

¹⁴⁵ For a comprehensive review of these policies, see FARNSWORTH, *supra* note 39, §§ 5.2-.5, at 326-43.

¹⁴⁶ See *id.* § 5.2, at 328-29. Parties cannot agree to waive liability for intentional or reckless torts; in employment contracts and residential leases, parties cannot waive liability for negligence. *Id.*

¹⁴⁷ See *id.* § 5.2, at 327.

¹⁴⁸ See *id.* § 5.3, at 331-37; Zamir, *supra* note 144, at 1740.

¹⁴⁹ See Shell, *supra* note 144, at 441.

¹⁵⁰ See *supra* note 81 and accompanying text.

¹⁵¹ See *supra* text accompanying notes 106-07. Parties apparently share this reluctance to treat marriages like contracts: "private marriage contracts tailored to individual needs and desires remain uncommon among first-time newlyweds." Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 461 (1998); see also Ellman, *supra* note 106, at 1367 (noting that few married couples make contracts to govern their relationship); Nock, *supra* note 106, at 1980 (arguing that "marriage is probably not best viewed as a contract because this is not how it is experienced" by married couples).

Silbaugh has recently shown, the picture is a good deal more complicated.¹⁵² While courts generally honor antenuptial agreements that relate to alimony and the distribution of property on divorce, they “are extremely reluctant to enforce provisions dealing with anything else,” including the division of labor within the marriage, the ability of the parties to seek divorce, and the religious upbringing of children.¹⁵³ Even with respect to agreements concerning alimony and property, courts conduct a heightened review for procedural and substantive fairness, using standards more stringent than those they apply in unconscionability cases.¹⁵⁴

Conflict of laws displays a similar pattern. While parties generally can choose the law that governs their transaction, significant limits exist. As I have explained, courts will not enforce a choice of law clause that selects a foreign law that is “contrary to a fundamental policy” of the forum state.¹⁵⁵ For example, courts have refused to enforce choice of law clauses that upset local rules on employment, government corruption, and insurance.¹⁵⁶ To be sure, “fundamental policy” is not an exact category, and courts have disagreed about whether this or that policy falls within the exception.¹⁵⁷ The fact that the exception exists at all, however, demonstrates that courts remain unwilling to allow parties to displace rules that seem essential to overriding public values.

The fact that freedom of contract continues to share the stage with competing principles should come as no surprise. Law always reflects a community’s values, and American contract law reflects the continuing conflict in our society between individual freedom

¹⁵² Silbaugh, *supra* note 103, at 70-92.

¹⁵³ *Id.* at 78; *see also id.* at 76-92.

¹⁵⁴ *See id.* at 74-76; *see also* Regan, *supra* note 81, at 638 (explaining that courts often do not show marital contracts the same “deference . . . they accord conventional commercial contracts”). *But cf.* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 158 (1998) (arguing that there exists “[a]n almost even split among the jurisdictions . . . on the procedural and substantive fairness elements of [antenuptial] agreements, with the slight majority probably willing to enforce with few or no requirements on those elements”).

¹⁵⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2). For further discussion, *see supra* text accompanying note 129.

¹⁵⁶ *See* BORN, *supra* note 124, at 656. Likewise, courts have refused to honor choice of law clauses that appear in adhesion contracts. *See* Sterk, *supra* note 123, at 964.

¹⁵⁷ *See* Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 264-66 (1993); Russell J. Weintraub, “At Least, Do No Harm”: Does the Second Restatement of Conflicts Meet the Hippocratic Standard?, 56 MD. L. REV. 1284, 1292-98 (1997). The Restatement commentary states that a fundamental policy must be “substantial,” and gives as examples policies embodied in statutes that make certain kinds of contracts illegal. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g.

and public control.¹⁵⁸ This conflict is unavoidable in a liberal democracy like ours and grand theories can do little to resolve it. The best the law can do is fashion reasonable compromises on a case-by-case basis.¹⁵⁹ The nature of these compromises will change over time as society's interests evolve; freedom of contract will expand in some areas and recede in others.¹⁶⁰ As long as Americans remain committed both to autonomy and public order, however, our law of contract will be marked by a profound and inescapable tension.

Fall and Rise makes a useful contribution to the literature. The book's demonstration of freedom of contract's enduring strength is engaging and in many ways compelling. Still, in discussing trends in contract law, a bit of caution is always in order. Just as scholars were too quick to dismiss freedom of contract a generation ago, we may be too quick to celebrate its triumph over rival principles today. In contract law, "rises" and "falls" are always muted. More than anything else, the history of contract law demonstrates the truth of Morris Cohen's insightful observation: "the roots of the law of contract are many rather than one."¹⁶¹

¹⁵⁸ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977); see also Kessler, *supra* note 2, at 2, reprinted in *A CONTRACTS ANTHOLOGY*, *supra* note 2, at 32.

¹⁵⁹ See Trebilcock, *supra* note 45, at 92-93; see also MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 34 (1962) (arguing that no easy formula can resolve the tensions between individual freedom and social control); HILLMAN, *supra* note 27, at 269 ("[C]ontract law flourishes largely because it is the fruit of the legal system's reasonable and practical compromises over conflicting values and interests in a diverse society."); cf. Williston, *supra* note 35, at 374 ("Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare and that the only ultimate test of proper limitations is that provided by experience.").

¹⁶⁰ See Kessler, *supra* note 2, at 17, reprinted in *A CONTRACTS ANTHOLOGY*, *supra* note 2, at 38; Pettit, *supra* note 7, at 352.

¹⁶¹ Cohen, *supra* note 29, at 591.